

67-25-302. Restrictions on outside employment by executive branch employees.

(1) An employee who is under the direction or control of an executive branch elected official may not engage in outside employment that:

- (a) constitutes a conflict of interest;
- (b) interferes with the ability of the employee to fulfill the employee's job responsibilities;
- (c) constitutes the provision of political services, political consultation, or lobbying;
- (d) involves the provision of consulting services, legal services, or other services to a person that the employee could, within the course and scope of the employee's primary employment, provide to the person; or
- (e) interferes with the hours that the employee is expected to perform work under the direction or control of an executive branch elected official, unless the employee takes authorized personal leave during the time that the person engages in the outside employment.

(2) An executive branch official shall be subject to the same restrictions on outside employment as a career service employee.

(3) This section does not prohibit an employee from advocating the position of the state office that employs the employee regarding legislative action or other government action.

Enacted by Chapter 425, 2013 General Session

Rule 4.2. Communication with Persons Represented by Counsel.

(a) General Rule. In representing a client, a lawyer shall not communicate about the subject of the representation with a person the lawyer knows to be represented by another lawyer in the matter, unless the lawyer has the consent of the other lawyer. Notwithstanding the foregoing, an attorney may, without such prior consent, communicate with another's client if authorized to do so by any law, rule, or court order, in which event the communication shall be strictly restricted to that allowed by the law, rule or court order, or as authorized by paragraphs (b), (c), (d) or (e) of this Rule.

(b) Rules Relating to Unbundling of Legal Services. A lawyer may consider a person whose representation by counsel in a matter does not encompass all aspects of the matter to be unrepresented for purposes of this Rule and Rule 4.3, unless that person's counsel has provided written notice to the lawyer of those aspects of the matter or the time limitation for which the person is represented. Only as to such aspects and time is the person considered to be represented by counsel.

(c) Rules Relating to Government Lawyers Engaged in Civil or Criminal Law Enforcement. A government lawyer engaged in a criminal or civil law enforcement matter, or a person acting under the lawyer's direction in the matter, may communicate with a person known to be represented by a lawyer if:

(c)(1) the communication is in the course of, and limited to, an investigation of a different matter unrelated to the representation or any ongoing, unlawful conduct; or

(c)(2) the communication is made to protect against an imminent risk of death or serious bodily harm or substantial property damage that the government lawyer reasonably believes may occur and the communication is limited to those matters necessary to protect against the imminent risk; or

(c)(3) the communication is made at the time of the arrest of the represented person and after that person is advised of the right to remain silent and the right to counsel and voluntarily and knowingly waives these rights; or

(c)(4) the communication is initiated by the represented person, directly or through an intermediary, if prior to the communication the represented person has given a written or recorded voluntary and informed waiver of counsel, including the right to have substitute counsel, for that communication.

(d) Organizations as Represented Persons.

(d)(1) When the represented person is an organization, an individual is represented by counsel for the organization if the individual is not separately represented with respect to the subject matter of the communication, and

(d)(1)(A) with respect to a communication by a government lawyer in a civil or criminal law enforcement matter, is known by the government lawyer to be a current member of the control group of the represented organization; or

(d)(1)(B) with respect to a communication by a lawyer in any other matter, is known by the lawyer to be

(d)(1)(B)(i) a current member of the control group of the represented organization; or

(d)(1)(B)(ii) a representative of the organization whose acts or omissions in the matter may be imputed to the organization under applicable law; or

(d)(1)(B)(iii) a representative of the organization whose statements under applicable rules of evidence would have the effect of binding the organization with respect to proof of the matter.

(d)(2) The term "control group" means the following persons: (A) the chief executive officer, chief operating officer, chief financial officer, and the chief legal officer of the organization; and (B) to the extent not encompassed by Subsection (A), the chair of the organization's governing body, president, treasurer, secretary and a vice-president or vice-chair who is in charge of a principal business unit, division or function (such as sales, administration or finance) or performs a major policy-making function for the organization; and (C) any other current employee or official who is known to be participating as a principal decision maker in the determination of the organization's legal position in the matter.

(d)(3) This Rule does not apply to communications with government parties, employees or officials unless litigation about the subject of the representation is pending or imminent. Communications with elected officials on policy matters are permissible when litigation is pending or imminent after disclosure of the representation to the official.

(e) Limitations on Communications. When communicating with a represented person pursuant to this Rule, no lawyer may

(e)(1) inquire about privileged communications between the person and counsel or about information regarding litigation strategy or legal arguments of counsel or seek to induce the person to forgo representation or disregard the advice of the person's counsel; or

(e)(2) engage in negotiations of a plea agreement, settlement, statutory or non-statutory immunity agreement or other disposition of actual or potential criminal charges or civil enforcement claims or sentences or penalties with respect to the matter in which the person is represented by counsel unless such negotiations are permitted by law, rule or court order.

Comment

[1] Rule 4.2 of the Utah Rules of Professional Conduct deviates substantially from ABA Model Rule 4.2 by the

addition of paragraphs (b), (c), (d) and (e). Paragraphs (c), (d) and (e) are substantially the same as the former Utah Rules 4.2(b), (c) and (d), adopted in 1999, as are most of the corresponding comments that address these three paragraphs of this Rule. There is also a variation from the Model Rule in paragraph (a), where the body of judicially created rules are added as a source to which the lawyer may look for general exceptions to the prohibition of communication with persons represented by counsel. (Because of these major differences, the comments to this Rule do not correspond numerically to the comments in ABA Model Rule 4.2.

[2] This Rule contributes to the proper functioning of the legal system by protecting a person who has chosen to be represented by a lawyer in a matter against possible overreaching by other lawyers who are participating in the matter, interference by those lawyers with the client-lawyer relationship and the uncounselled disclosure of information relating to the representation.

[3] This Rule applies to communications with any person who is represented by counsel concerning the matter to which the communication relates.

[4] This Rule applies even though the represented person initiates or consents to the communication. A lawyer must immediately terminate communication with a person if, after commencing communication, the lawyer learns that the person is one with whom communication is not permitted by this Rule.

[5] This Rule does not prohibit communication with a represented person or an employee or agent of such a person where the subject of the communication is outside the scope of the representation. For example, the existence of a controversy between a government agency and a private party, between two organizations, between individuals or between an organization and an individual does not prohibit a lawyer for either from communicating with nonlawyer representatives of the other regarding a separate matter. Nor does the Rule prohibit government lawyers from communicating with a represented person about a matter that does not pertain to the subject matter of the representation but is related to the investigation, undercover or overt, of ongoing unlawful conduct. Moreover, this Rule does not prohibit a lawyer from communicating with a person to determine if the person in fact is represented by counsel concerning the subject matter that the lawyer wishes to discuss with that person.

[6] This Rule does not preclude communication with a represented person who is seeking a second opinion from a lawyer who is not otherwise representing a client in the matter. A lawyer may not make a communication prohibited by this Rule through the acts of another. See Rule 8.4(a). Parties to a matter may communicate directly with each other, and a lawyer is not prohibited from advising a client concerning a communication that the client is legally entitled to make.

[7] A lawyer may communicate with a person who is known to be represented by counsel in the matter to which the communication relates only if the communicating lawyer obtains the consent of the represented person's lawyer, or if the communication is otherwise permitted by paragraphs (a), (b) or (c). Paragraph (a) permits a lawyer to communicate with a person known to be represented by counsel in a matter without first securing the consent of the represented person's lawyer if the communicating lawyer is authorized to do so by law, rule or court order. Paragraph (b) recognizes that the scope of representation of a person by counsel may, under Rule 1.2, be limited by mutual agreement. Because a lawyer for another party cannot know which of Rule 4.2 or 4.3 applies under these circumstances, the lawyer who has undertaken a limited representation must assume the responsibility for informing another party's lawyer of the limitations. This ensures that such a limited representation will not improperly or unfairly induce an adversary's lawyer to avoid contacting the person on those aspects of a matter for which the person is not represented by counsel. Note that this responsibility on the lawyer undertaking limited-scope representation also relates to the ability of another party's lawyer to make certain *ex parte* contacts without violating Rule 4.3. Utah Rule of Professional Conduct 4.2(b) and related sections of this Comment are part of the additions to the ABA Model Rules clarifying that a lawyer may undertake limited representation of a client under the provisions of Rule 1.2. Paragraph (c) specifies the circumstances in which government lawyers engaged in criminal and civil law enforcement matters may communicate with persons known to be represented by a lawyer in such matters without first securing consent of that lawyer.

[8] A communication with a represented person is authorized by paragraph (a) if permitted by law, rule or court order. This recognizes constitutional and statutory authority as well as the well-established role of the state judiciary in regulating the practice of the legal profession. Direct communications are also permitted if they are made pursuant to discovery procedures or judicial or administrative process in accordance with the orders or rules of the court or other tribunal before which a matter is pending.

[9] A communication is authorized under paragraph (a) if the lawyer is assisting the client to exercise a constitutional right to petition the government for redress of grievances in a policy dispute with the government and if the lawyer notifies the government's lawyer in advance of the intended communication. This would include, for example, a communication by a lawyer with a governmental official with authority to take or recommend action in the matter, provided that the sole purpose of the lawyer's communication is to address a policy issue, including the possibility of resolving a disagreement about a policy position taken by the government. If, on the other hand, the matter does not relate solely to a policy issue, the communicating lawyer must comply with this Rule.

[10] In the event the person with whom the lawyer communicates is not known to be represented by counsel in the matter, the lawyer's communication is subject to Rule 4.3.

[11] Paragraph (c) of this Rule makes clear that this Rule does not prohibit all communications with represented persons by state or federal government lawyers (including law enforcement agents and cooperating witnesses acting at their direction) when the communications occur during the course of civil or criminal law enforcement. The exemptions for government lawyers contained in paragraph (c) of this Rule recognize the unique responsibilities of government lawyers to enforce public law. Nevertheless, where the lawyer is representing the government in any other role or litigation (such as a contract or tort claim, for example) the same rules apply to government lawyers as are applicable to lawyers for private parties.

[12] A "civil law enforcement proceeding" means a civil action or proceeding before any court or other tribunal brought by the governmental agency that seeks to engage in the communication under relevant statutory or regulatory provisions, or under the government's police or regulatory powers to enforce the law. Civil law enforcement proceedings do not include proceedings related to the enforcement of an administrative subpoena or summons or a civil investigative demand; nor do they include enforcement actions brought by an agency other than the one that seeks to make the communication.

[13] Under paragraph (c) of this Rule, communications are permitted in a number of circumstances. For instance, subparagraph (c)(1) permits the investigation of a different matter unrelated to the representation or any ongoing unlawful conduct. (Unlawful conduct involves criminal activity and conduct subject to a civil law enforcement proceeding.) Such violations include, but are not limited to, conduct that is intended to evade the administration of justice including in the proceeding in which the represented person is a defendant, such as obstruction of justice, subornation of perjury, jury tampering, murder, assault, or intimidation of witnesses, bail jumping, or unlawful flight to avoid prosecution. Also, permitted are undercover activities directed at ongoing criminal activity, even if it is related to past criminal activity for which the person is represented by counsel.

[14] Under subparagraph (c)(2), a government lawyer may engage in limited communications to protect against an imminent risk of serious bodily harm or substantial property damage. The imminence and gravity of the risk will be determined from the totality of the circumstances. Generally, a risk would be imminent if it is likely to occur before the government lawyer could obtain court approval or take other reasonable measures. An imminent risk of substantial property damage might exist if there is a bomb threat directed at a public building. The Rule also makes clear that a government attorney may communicate directly with a represented party A at the time of arrest of the represented party" without the consent of the party's counsel, provided that the represented party has been fully informed of his or her constitutional rights at that time and has waived them. A government lawyer must be very careful to follow Rule 4.2(d) and would have a significant burden to establish that the waiver of right to counsel was knowing and voluntary. The better practice would include a written or recorded waiver. Nothing in this Rule, however, prevents law enforcement officers, even if acting under the general supervision of a government lawyer, from questioning a represented person. The actions of the officers will not be imputed to the government lawyer unless the conversation has been "scripted" by the government lawyer.

[15] If government lawyers have any concerns about the applicability of any of the provisions of paragraph (c) or are confronted with other situations in which communications with represented persons may be warranted, they may seek court approval for the *ex parte* communication.

[16] Any lawyer desiring to engage in a communication with a represented person that is not otherwise permitted under this Rule must apply in good faith to a court of competent jurisdiction, either *ex parte* or upon notice, for an order authorizing the communication. This means, depending on the context: (1) a district judge or magistrate judge of a United States District Court; (2) a judge or commissioner of a court of general jurisdiction of a state having jurisdiction over the matter to which the communication relates; or (3) a military judge.

[17] In determining whether a communication is appropriate a lawyer may want to consider factors such as: (1) whether the communication with the represented person is intended to gain information that is relevant to the matter for which the communication is sought; (2) whether the communication is unreasonable or oppressive; (3) whether the purpose of the communication is not primarily to harass the represented person; and (4) whether good cause exists for not requesting the consent of the person's counsel prior to the communication. The lawyer should consider requesting the court to make a written record of the application, including the grounds for the application, the scope of the authorized communications, and the action of the judicial officer, absent exigent circumstances.

[18] Organizational clients are entitled to the protections of this Rule. Paragraph (d) specifies which individuals will be deemed for purposes of this Rule to be represented by the lawyer who is representing the organization in a matter. Included within the control group of an organizational client, for example, would be the designated high level officials identified in subparagraph(d)(2). Whether an officer performs a major policy function is to be determined by reference to the organization's business as a whole. Therefore, a vice-president who has policy making functions in connection with only a unit or division would not be a major policy maker for that reason alone, unless that unit or division represents a substantial part of the organization's total business. A staff member who gives advice on policy but does not have authority, alone or in combination with others, to make policy does not perform a major policy making function.

[19] Also included in the control group are other current employees known to be "participating as principal decision makers" in the determination of the organization's legal position in the proceeding or investigation of the matter. In this context, "employee" could also encompass former employees who return to the company's payroll or are specifically retained for compensation by the organization to participate as principal decision makers for a particular matter. In general, however, a lawyer may, consistent with this Rule, interview a former employee of an organization without consent of the organization's lawyer.

[20] In a criminal or civil law enforcement matter involving a represented organization, government lawyers may, without consent of the organization's lawyer, communicate with any officer, employee, or director of the organization who is not a member of the control group. In all other matters involving organizational clients, however, the protection of this Rule is extended to two additional groups of individuals: individuals whose acts might be imputed to the organization for the purpose of subjecting the organization to civil or criminal liability and individuals whose statements might be binding upon the organization. A lawyer permitted by this Rule to communicate with an officer, employee, or director of an organization must abide by the limitations set forth in paragraph (e).

[21] This Rule does prohibit communications with any person who is known by the lawyer making the communication to be represented by counsel in the matter to which the communication relates. A person is "known" to be represented when the lawyer has actual knowledge of the representation. Knowledge is a question of fact to be

resolved by reference to the totality of the circumstances, including reference to any written notice of the representation. See Rule 1.0(f) Written notice to a lawyer is relevant, but not conclusive, on the issue of knowledge. Lawyers should ensure that written notice of representation is distributed to all attorneys working on a matter.

[22] Paragraph (e) is intended to regulate a lawyer's communications with a represented person, which might otherwise be permitted under the Rule, by prohibiting any lawyer from taking unfair advantage of the absence of the represented person's counsel. The prohibition contained in paragraph (e) is limited to inquiries concerning privileged communications and lawful defense strategies. The Rule does not prohibit inquiry into unlawful litigation strategies or communications involving, for example, perjury or obstruction of justice.

[23] The prohibition of paragraph (e) against the communicating lawyer's negotiating with the represented person with respect to certain issues does not apply if negotiations are authorized by law, rule or court order. For example, a court of competent jurisdiction could authorize a lawyer to engage in direct negotiations with a represented person. Government lawyers may engage in such negotiations if a represented person who has been arrested, charged in a criminal case, or named as a defendant in a civil law enforcement proceeding initiates communications with the government lawyer and the communication is otherwise consistent with requirement of subparagraph (c)(4).

Rule 1.10. Imputation of Conflicts of Interest: General Rule.

(a) While lawyers are associated in a firm, none of them shall knowingly represent a client when any one of them practicing alone would be prohibited from doing so by Rules 1.7 or 1.9, unless the prohibition is based on a personal interest of the prohibited lawyer and does not present a significant risk of materially limiting the representation of the client by the remaining lawyers in the firm.

(b) When a lawyer has terminated an association with a firm, the firm is not prohibited from thereafter representing a person with interests materially adverse to those of a client represented by the formerly associated lawyer and not currently represented by the firm, unless:

(b)(1) the matter is the same or substantially related to that in which the formerly associated lawyer represented the client; and

(b)(2) any lawyer remaining in the firm has information protected by Rules 1.6 and 1.9(c) that is material to the matter.

(c) When a lawyer becomes associated with a firm, no lawyer associated in the firm shall knowingly represent a person in a matter in which that lawyer is disqualified under Rule 1.9 unless:

(c)(1) the personally disqualified lawyer is timely screened from any participation in the matter and is apportioned no part of the fee therefrom, and

(c)(2) written notice is promptly given to any affected former client.

(d) A disqualification prescribed by this Rule may be waived by the affected client under the conditions stated in Rule 1.7.

(e) The disqualification of lawyers associated in a firm with former or current government lawyers is governed by Rule 1.11.

(f) An office of government lawyers who serve as counsel to a governmental entity such as the office of the Utah Attorney General, the United States Attorney, or a district, county, or city attorney does not constitute a "firm" for purposes of Rule 1.10 conflict imputation.

Comment

Definition of "Firm"

[1] ~~For purposes of the Rules of Professional Conduct, the term "firm" denotes lawyers in a law partnership, professional corporation, sole proprietorship or other association authorized to practice law; or lawyers employed in a legal services organization or the legal department of a corporation or other organization. See Rule 1.0(c). "Firm," as used in this rule, is defined in Rule 1.0(d). Whether two or more lawyers constitute a firm within this definition for purposes of determining conflict imputation can depend on the specific facts. See Rule 1.0, Comments [2]–[4].~~

[1a] Rule 1.10(f) does not appear in the ABA Model Rules. It is intended to recognize the inherent differences between an office of government lawyers and those in a firm, as defined in Rule 1.0(d). Notwithstanding the exclusion of an office of government lawyers from the provisions of Rule 1.10, all other conflicts rules, such as Rules 1.7, 1.8, and 1.11, must be fully satisfied on an individual-lawyer basis, and the group of government attorneys must, by adopting appropriate procedures, ensure that attorneys for whom there are individual conflict issues do not participate in and are screened from the particular representation. See Rule 1.0(l) for definition of "screened."

Principles of Imputed Disqualification

[2] The rule of imputed disqualification stated in paragraph (a) gives effect to the principle of loyalty to the client as it applies to lawyers who practice in a law firm. Such situations can be considered from the premise that a firm of lawyers is essentially one lawyer for purposes of the rules governing loyalty to the client, or from the premise that each lawyer is vicariously bound by the obligation of loyalty owed by each lawyer with whom the lawyer is associated. Paragraph (a) operates only among the lawyers currently associated in a firm. When a lawyer moves from one firm to another, the situation is governed by Rules 1.9(b) and 1.10(b).

[3] The rule in paragraph (a) does not prohibit representation where neither questions of client loyalty nor protection of confidential information are presented. Where one lawyer in a firm could not effectively represent a given client because of strong political beliefs, for example, but that lawyer will do no work on the case and the personal beliefs of the lawyer will not materially limit the representation by others in the firm, the firm should not be disqualified. On the other hand, if an opposing party in a

61 case were owned by a lawyer in the law firm, and others in the firm would be materially
62 limited in pursuing the matter because of loyalty to that lawyer, the personal
63 disqualification of the lawyer would be imputed to all others in the firm.

64 [4] The rule in paragraph (a) also does not prohibit representation by others in the
65 law firm where the person prohibited from involvement in a matter is a nonlawyer, such
66 as a paralegal or legal secretary. Nor does paragraph (a) prohibit representation if the
67 lawyer is prohibited from acting because of events before the person became a lawyer,
68 for example, work that the person did while a law student. Such persons, however,
69 ordinarily must be screened from any personal participation in the matter to avoid
70 communication to others in the firm of confidential information that both the nonlawyers
71 and the firm have a legal duty to protect. See Rules 1.0(l) and 5.3.

72 [5] Rule 1.10(b) operates to permit a law firm, under certain circumstances, to
73 represent a person with interests directly adverse to those of a client represented by a
74 lawyer who formerly was associated with the firm. The Rule applies regardless of when
75 the formerly associated lawyer represented the client. However, the law firm may not
76 represent a person with interests adverse to those of a present client of the firm, which
77 would violate Rule 1.7. Moreover, the firm may not represent the person where the
78 matter is the same or substantially related to that in which the formerly associated
79 lawyer represented the client and any other lawyer currently in the firm has material
80 information protected by Rules 1.6 and 1.9(c).

81 [5a] The Utah rule differs from the ABA Model Rule in allowing lawyers disqualified
82 under Rule 1.9 to be screened from participation in a matter under certain
83 circumstances. If the conditions of paragraph (c) are met, imputation is removed, and
84 consent to the new representation is not required. Lawyers should be aware, however,
85 that courts may impose more stringent conditions in ruling upon motions to disqualify a
86 lawyer from pending litigation.

87 [5b] Requirements for screening procedures are stated in Rule 1.0(l). Paragraph
88 (c)(2) does not prohibit the screened lawyer from receiving a salary or partnership share
89 established by prior independent agreement, but that lawyer may not receive
90 compensation directly related to the matter in which the lawyer is disqualified.

91 [5c] Notice, including a description of the screened lawyer's prior representation and
92 of the screening procedures employed, should be given as soon as practicable after the
93 need for screening becomes apparent.

94 [6] Rule 1.10(d) removes imputation with the informed consent of the affected client
95 or former client under the conditions stated in Rule 1.7. The conditions stated in Rule
96 1.7 require the lawyer to determine that the representation is not prohibited by Rule
97 1.7(b) and that each affected client or former client has given informed consent to the
98 representation, confirmed in writing. In some cases, the risk may be so severe that the
99 conflict may not be cured by client consent. For a discussion of the effectiveness of
100 client waivers of conflicts that might arise in the future, see Rule 1.7, Comment [22]. For
101 a definition of informed consent, see Rule 1.0(f).

102 [7] Where a lawyer has joined a private firm after having represented the
103 government, imputation is governed by Rule 1.11(b) and (c), not this Rule. Under Rule
104 1.11(d), where a lawyer represents the government after having served clients in private
105 practice, nongovernmental employment or in another government agency, former-client
106 conflicts are not imputed to government lawyers associated with the individually
107 disqualified lawyer.

108 [8] Where a lawyer is prohibited from engaging in certain transactions under Rule
109 1.8, paragraph (k) of that Rule, and not this Rule, determines whether that prohibition
110 also applies to other lawyers associated in a firm with the personally prohibited lawyer.

111